# Petition

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In The

# Supreme Court of the United States

October Term, 1981

JULIO CESAR ALVARADO,

*Petitioner,*

*vs.*

INWOOD PANAMA, S.A.,

*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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## THE QUESTIONS PRESENTED

1. Should the injured petitioner be granted a new trial after the jury found two verdicts in his favor, one for $65,000, the second for $20,000; and finally the District Court entered judgment in favor of the respondent for $7.50?

2. Did the continuous resubmission of interrogatories to the jury result in thwarting the will of the jury to find a verdict for the plaintiff, in opposition to cases decided by this Court and the Court of Appeals of the Second Circuit; should the petitioner have a new trial?

## THE PARTIES

The parties to this proceeding are those listed in the caption of the case.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Julio Cesar Alvarado prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on March 20, 1981, and the denial of the petition for rehearing on May 13, 1981. The issues are whether the petitioner should have a new trial after the jury first returned two verdicts in his favor, and whether the continuous submission of interrogatories by the District Court improperly frustrated the will of the jury to find for the petitioner.

## OPINION BELOW

The memorandum order of the District Court dated September 22, 1980 has not been reported, but is set forth in its entirety in Appendix A, *infra*, 1a). The judgment of the District Court is set out in Appendix B (6a). The opinion of the United States Court of Appeals for the Second Circuit dated March 20, 1981, has not been reported, but is set forth completely in Appendix C (8a). The order of the court denying the petition for rehearing dated May 13, 1981, is set out in Appendix D (11a).

## JURISDICTION

The summary judgment of the United States Court of Appeals for the Second Circuit printed in Appendix C (8a) was entered on March 20, 1981. The order of the same court denying a timely petition for a rehearing in banc printed in Appendix D (11a) was entered on May 13, 1981.

The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. §1254(1). The proper submission of interrogatories to a jury and following the will of the jury with reference to their answers to interrogatories are important phases of federal law that should be clarified by this Court. These phases of federal law affect all litigants in cases where interrogatories are submitted to a jury. The Court should define the extent of a judge's role in continuous submission of interrogatories to the jury.

The jurisdiction in the District Court was based on the Jones Act (46 U.S.C.A. §688), the General Maritime Law, and the Law of Liberia; the claim for maintenance and cure was based on the General Maritime Law.

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Seventh Amendment to the Constitution of the United States provides as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law."

Rule 49(a) relating to special verdicts and interrogatories is set out in Appendix E (13a).

The Jones Act, 46 U.S.C.A. §688, is set out in Appendix F (14a).

The extract of the Advisory Committee's Note on Rule 50(c)(2), which is taken from 31 Federal Rules Decisions 646, is set out in Appendix G (15a).

## STATEMENT OF THE CASE

The petitioner Julio Cesar Alvarado brought this suit in the United States District Court for the Southern District of New York to recover damages for personal injuries sustained while he was employed aboard the M.V. OLYMPIC POWER between June 3, 1977 and September 23, 1977. His suit was based on the Jones Act (46 U.S.C.A. §688), the General Maritime Law and the Law of Liberia; the claim for maintenance was based on the General Maritime Law. The trial took place on June 11, 12 and 13, 1980 before the Hon. Pierre N. Leval, U.S.D.J. and the jury. After the court submitted

written questions to the jury, the jury returned two special verdicts in favor of the petitioner. When the jury was discharged, the court requested memoranda from both parties, and finally awarded the petitioner the sum of $3,740 less $3,747.50 leaving a balance of $7.50 in favor of the respondent. Judgment No. 80,1169 was filed in favor of respondent for that sum.

In answering the written questions the jury first awarded the petitioner the sum of $65,000; after submission of further written questions, the jury awarded the petitioner the sum of $20,000.

**A. History of Trial**

When the petitioner seaman joined the M.V. OLYMPIC POWER about June 3, 1977, he was approximately 23 years of age, having been born on February 17, 1954 in Honduras (R60a).[1] When the vessel was in Lake Charles, Louisiana, he was injured (R67a). While the vessel was at that port, he was injured on July 13, 1977 (R72a). He was eating lunch, and about 12:15 p.m. he was ordered to assist in closing hatches because it was raining (R73a). While going in the direction of hatch No. 1, he slipped and struck a sill on a door, hitting himself on the right leg below the knee; he fell in a seated position (R78a-80a). A diagram from petitioner's deposition (R84a) is included as Exhibit 11 in the designation of exhibits by petitioner which is part of the record on appeal in the lower court. The petitioner's leg was bleeding (R85a), he received shoreside medical attention (R86a) and continued with the vessel (R87a).

Thereafter, approximately around the 14th of August 1977, he was injured while the vessel was on the high seas; the petitioner estimated that the injury occurred when he was approximately around twenty-three, twenty-four days after leaving Lake Charles, Louisiana (R87a). Petitioner's Exhibit 12

1. Refers to Record on Appeal in lower court.

is a diagram from petitioner's deposition (R88a-89a included with petitioner's Designation of Exhibits in the Record on Appeal).

The boatswain ordered Mr. Alvarado to put hammers, scrapers, brooms, wire brushes into one bucket as well as a shovel; into another bucket he was to put an air chipper. Then he was ordered by the boatswain to go to hatch No. 4 where the deck crew would work (R90a). As he was walking along on the open deck toward hatch No. 4, the vessel dipped at the bow and the petitioner slipped and fell in a seated position (R91a-92a). At page R93a he describes the weather at the time of the second injury as follows: Bad weather, no rain, waves were coming over the ship, water was falling; water over the ship, the ship was plunging, the ship was pitching and rolling, we were in bad weather throughout the passage, more than one day (R93a). The petitioner fell in a seated position, slid about 15 feet, striking the ship's railing, losing some of the tools into the water (R93a-95a). The boatswain, the chief officer and two other seamen were in the area where the plaintiff was hurt (R95a-96a). The petitioner complained to the boatswain that his right side was hurting — from the groin around the right side to the right buttocks (R96a-97a). The petitioner also reported his injuries to the captain who gave him pills (R98a-99a). The petitioner continued to work until the ship arrived in Jakarta, except one or two days off for rest (R99a-100a).

His whole right leg hurt. The pain in the buttock area did not subside. The leg was swollen (R100a). A doctor examined the petitioner in Jakarta; this doctor gave him medication (R101a-103a). After the first examination by a doctor in Jakarta, the petitioner complained to the captain about his pain; the captain sent him to another doctor in the same city, which is in Indonesia (R103a-104a). This doctor in turn sent the petitioner to a neurologist — to whom the petitioner complained of pain

(R104a-105a). The neurologist performed tests and had the petitioner go with the third officer of the vessel for x-rays. After the x-rays were taken, the neurologist wrote something and gave it to the third officer of the vessel before he and the petitioner returned to the ship (R105a-106a). On his return, the captain of the ship ordered the petitioner to stay in his quarters (R106a) where he took antibiotics, pills and capsules (R107a).

When the vessel arrived in Singapore about the 22nd or 23rd of September 1977, the leg was swelling and the petitioner was crying because of pain, and a doctor came to the vessel (R107a). This doctor examined the petitioner, gave him medicine and the petitioner remained off duty for about six days (R108a). The ship was going into dry dock, the captain sent the petitioner to a hospital in Singapore where he was examined; after this examination, the petitioner went back to the vessel, remained off duty until he was discharged from the ship in Singapore (R109a-110a).

Petitioner's Exhibit 1 — report of Dr. T.C. Cheo dated September 17, 1977 indicates that the opinion of the doctor was the petitioner had right sciatica. Petitioner's Exhibit 2 — report of Dr. K.P. Wong dated September 19, 1977 gave the opinion that the petitioner was suffering from a prolapsed interverval disc (sic. intervertebral). Both these examinations occurred in Singapore.

When the petitioner was in Jakarta, Indonesia during the first week of September 1977, he was examined by a Dr. Saputra. The respondent was unable to produce a medical report from that doctor (R317a-318a).

After petitioner's discharge from the vessel, he was repatriated to San Pedro Sula, Honduras where he arrived about September 24th or September 25th (R110a). When he saw

Mr. Recarte (the man from whom he sought reemployment R9a), Mr. Recarte sent him to Dr. German Salgado Diaz (R111a). Suffering from constant pain, the petitioner was examined by this doctor who admitted him to a clinic where he remained between September 26th and the 26th or 28th of October. The petitioner underwent surgery in the spinal column and received treatment from a physiotherapist for about 5 to 7 weeks (R112a-113a).

Petitioner's Exhibit 3 and the Spanish-English translation of Exhibit 3 — marked as Exhibit 3a — constitute a report by Dr. German Salgado Diaz. The doctor states a diagnosis of central discal hernia of lumbar 4 and lumbar 5 and hernia lateralized to the right of lumbar 5 and sacral 1 with clear radicular compromise. Said suffering is the result of a work accident sustained on the high seas. The treatment is chiefly surgical and will consist of a laminectomy at two levels and removal of a herniated disc referred to above and the freeing of the affected nerve roots.

Petitioner's Exhibit 5 is a report by the same Dr. German Salgado Diaz dated February 4, 1978; Exhibit 5a is an English translation of that report. In the third paragraph of that report is the following:

> "Herniated Central Disk in the space Lumbar 4 and Lumbar 5 and a herniated disk right side in the Lumbar 5 and Sacral 1 area. He was operated on by us on October 4, 1977, verifying the diagnosis and carrying out a bilateral laminectomy at the levels Lumbar 4 and Lumbar 5 and a laminectomy right side Lumbar 5, Sacral 1 with excision of the disc. The neurological problems existing before the surgery and the limitation in movement improved to a marked

degree with the surgical process, there remaining only paresthesia on the right foot (Lumbar 5, Sacral 1). The original inability to work is for 180 days which may be extended according to the developments in convalescence. The patient is now undergoing medical and physiotherapy treatment. . . ."

Mr. Recarte gave the petitioner 100 lempiras every two weeks from his employer until about three or four weeks from the day the petitioner came out of the clinic (R113a-114a). Petitioner had to discontinue physiotherapy treatments because of lack of money on or about January 4, 1978 (R114a-115a). Petitioner has not returned to work, since January 4, 1978 (R115a).

Dr. Jorge Martinez Saybe examined the petitioner in September 1978; this doctor took x-rays and prescribed medication (R115a). Mr. Alvarado also visited neurologist Dr. Martinez (R117a). Dr. Martinez sent the petitioner to Dr. Salgado who examined him, said he needed an operation "but who is going to pay for it?" (R118a).

Petitioner states that he can't work because he cannot pass any examination or anything (R122a). Petitioner does no kind of work whatsoever (R123a). Petitioner feels pain in his whole right leg and in his spinal cord. He takes these pills — Rinosan, Osowintomilon and Wintomilon (R124a-125a). Petitioner wears an orthopedic brace on his back prescribed by Dr. Salgado Diaz on December 13, 1977 (R125a).

Dr. Robert Tuby examined the petitioner on behalf of the petitioner on January 12, 1980 (R219a). He found a midline linear operative scar from the level of L1 to S2 measuring 6 inches in length; pain on forward bending, restriction in

backward bending, complaint of pain on lateral bending and on rotation of trunk to either side (R221a). Passive motion by doctor elicits complaints of pain when petitioner bends from side to side or rotates trunk (R222a). Lasegue test positive on both sides, McBride test positive on right side (R222a). These two tests indicated the petitioner still had trouble with his lower back; atrophy of muscle of thigh, little atrophy of muscles of calf of right leg (R223a). The doctor found hyperesthesia indicating residuals of nerve roots coming out of the 4th and 5th interspace of the spine and the 5th and 1st sacral space of the spine (R223a-224a). The doctor stated that the knee jerks were diminished and the right ankle jerk was absent (R224a). The petitioner complained of backache and pain down right lower extremity. The diagnosis from the second incident was herniated disc at the level of L4, L5 and L5 S1 (R224a). The injuries were described as permanent (R225a).

If the petitioner's condition gets worse, it may be necessary to have further spinal surgery — a fusion of the spine (R226a). The petitioner could not resume work as a seaman (R227a). The doctor estimates the cost of surgery of a spinal fusion in New York as about $1,500; confinement in a hospital for ten days at $150 to $200 a day.

Captain Ash testified that it was unsafe and imprudent to work on decks when she (the vessel) is shipping any water, when she is pitching and rolling heavily and the normal procedure is to stay off the weather decks (R164a-165a).

Petitioner's Exhibit 9 is a copy of the log of the vessel furnished by the respondent. As previously stated, the petitioner had described the accident as occurring approximately around the 14th of August, 1977 (R87a). He had also described the weather at the time of the second injury as follows: Bad weather, no rain, waves were coming over the ship, water was falling;

water over the ship, the ship was plunging, the ship was pitching and rolling, we were in bad weather throughout the passage, more than one day (R93a).

The log for August 16, 1977 at 0800 showed there were rough seas and there was wind force 5 from the northeast. The next day, August 17, 1977, at 0800 there was a gale sea. The vessel was pitching and rolling. At 0800 on August 18, 1977, the wind force was 5, the wind came from the north and there was a rough sea (R437a-439a).

Further entries from the log show that on August 19th winds were from the northeast, force 5. Same as above rough seas. August 20th 0800 east, northeast as 7, moderate gale, very rough sea, vessel rolling heavily. August 21, 1977 0800 same weather conditions. No work performed. August 22, 1977 6. winds from the east, same as above weather conditions very rough seas. August 23, 0800 very rough sea, vessel pitching heavily, waves splashing (R443a).

Further, the ship's log showed on August 24 at 0800 winds from the east, beaufort scale 7, moderate gale, very rough sea, vessel pitching heavily. August 25th beaufort scale 6. winds from the east at 0800, same as above, very rough sea. August 26th at 0800 very rough sea, vessel pitching, waves splashing on deck (R444a).

On June 11, 1980, the petitioner's attorney had made a motion for an adjournment of the trial, so that the petitioner could testify in person instead of proceeding by the petitioner's deposition. The Court denied that motion and the trial went ahead (R22a-33a).

After the petitioner had rested, his attorney then moved to reopen the case in order to introduce wage vouchers of the

petitioner's Exhibits 8a, 8b and 8c for identification. The Court denied that motion (R365a-367a).

On the morning of June 13, 1980, a Friday, petitioner moved to adjourn the case to Monday, June 16, 1980 so that the petitioner could testify personally in rebuttal. He was scheduled to arrive in New York on June 13th in the evening.

Petitioner had previously made a trip to New York for his oral testimony and physical examination in January, 1980 (R27a). On that occasion he had put up a bond with the U.S. Immigration authorities. In order to get his visa to come to New York for the trial, he tried to have the U.S. Consul waive the bond, because that would take another two weeks for immigration procedures. Finally, the U.S. Consul did waive the bond and the petitioner arrived in New York on the evening of June 13, 1980—which developed to be the last day of the trial (R376a). *The Court offered to grant the application if the petitioner consented to remove the jury and try the case to the Court alone* (R384a-386a). *The petitioner refused to waive the jury and his motion for an adjournment was denied* (R386a-395a).

The Court proposed that the jury should be asked on what date it found the petitioner injured his back. The attorney for the petitioner objected (R363a). In continuing on the subject of special questions to the jury, the Court ignored jury findings that the petitioner had proposed (R554a-555a).

The weather conditions described in the ship's log for August 14th (Petitioner's Exhibit 9) did not correspond with the weather conditions described by the petitioner at the time he was injured (R93a). The weather conditions described in the log for the period between August 16th and August 26th agreed with what the petitioner had testified to. Petitioner, himself, had

testified that the accident occurred approximately around the 14th of August, 1977 (R87a).

In the preparation of the first set of interrogatories or questions for submission to the jury (R551a-553a), petitioner objected to Part II #2 (R450a) continued his objection to Part II #2 (R453a, 455a, 493a).

The jury then retired for deliberations (R494a) with a form later known as Court Exhibit 6 — Verdict 5:30 P.M. (R541a-543a).

Court Exhibit 5 is a note received from the jury requesting information on when the second accident occurred (R495a). After conferring with counsel, the Court answered the jury's questions (R500a). The Court read portions of petitioner's deposition on the date of the accident (R501a).

The Court discusses a draft note for use in the event of a monetary verdict for the petitioner (R501a-506a). The Court proposes to come up with a further draft (R506a-507a).

**B. Jury Returns First Special Verdict for Petitioner**

In the jury's verdict for the petitioner, Court Exhibit 6, Verdict 5:30 p.m. (R541a-543a) in answer to No. 8 of the Exhibit, the jury wrote $50,000; (R543a) and $15,000 for maintenance (R508-509a, 543a).

With reference to the date of the accident, the jury stated "on or about 8/14/77" in answer to Part II #2 and did not answer Part II, #3.

Counsel for the petitioner objected to the submission of any further forms to the jury because he felt the jury found a verdict

for the petitioner and stated the date of the accident in just the language petitioner used in his deposition — which had just been read to them (R509a, 513a).

The Court decided to give back to the jury the form the jury had rendered its special verdict on (R513a-514a).

At page R515a, the Court returns the original form and also a new blank form (R516a).

The Court denies petitioner's motion that the jury be furnished with a copy of the log, petitioner's Exhibit 9 (R516a).

The Court proposes to send another form to the jury (Court Exhibit 7) over the objections of petitioner's counsel (R517a-519a).

The jury sends in Note 9 inquiring about changes in Court Exhibit 6 — Verdict 8:05 p.m. (R520a) over the objections of counsel for the petitioner (R521a).

The Court sends the jury a new form (R522a; Court Exhibit 10).

**C. Jury Returns With Another Verdict for Petitioner.**

Court Exhibit 10 indicates that the jury now stated the accident occurred on August 14, 1977 (R527a, 549a). It awarded damages for failure to pay maintenance in the amount of $20,000 (R527a, 550a). The jury then filed Court Exhibit 7, page 2 on the amount of damages amounting to $20,000 (R528a, 548a).

Petitioner moves to reinstate original verdict of jury to $65,000 (R530a-532a).

The Court instructs the attorneys to serve memoranda on the amount of judgment to be entered on the special verdicts (R536a-539a).

## REASONS FOR GRANTING THE WRIT

### I.

**The courts below should have awarded a new trial for the petitioner after the jury awarded two verdicts for the petitioner.**

Referring to *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 328 (1967), this Court held:

> "Likewise, if the plaintiff's verdict is set aside by the trial court on defendant's motion for judgment n.o.v., plaintiff may bring these very grounds directly to the court of appeals without moving for a new trial in the district court. Final action on these issues normally rests with the court of appeals."[2]

Petitioner requested a new trial in his petition for a rehearing to the Court of Appeals. Further, the District Court on its own motion, could have ordered a new trial.

The jury believed the evidence of petitioner on both liability

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2. The Advisory Committee's Note to Rule 50(c) explains:

> "'Even if the verdict-winner makes no motion for a new trial, he is entitled upon his appeal from the judgment n.o.v. not only to urge that that judgment should be reversed and judgment entered upon the verdict, but that errors were committed during the trial which at the least entitle him to a new trial.' 31 F.R.D. 646."

and damages. (*See* pages 19, *infra.*) In finding for the petitioner the first time, after having had his deposition testimony read to them about the date of the accident, the jury found that the accident occurred "On or about 8/14/77," opposite the printed word "YES" in No. 2 (R545a) — exactly as the petitioner testified in his deposition. There was no ambiguity when the succeeding interrogatory was not answered. The jury agreed with petitioner's recollection, in his testimony before trial, which was given about 840 days after he was hurt on the ship; and since the brain of this petitioner is not a time machine, he testified honestly and faithfully to the best of his recollection about the date when he was hurt. In looking at the ship's log from August 16, 1977 to August 26, 1977, the weather recorded in that log corresponded to the weather conditions described by petitioner in his deposition (R437a-444a).

Because the District Court refused to accept the answers of the jury, it thrust more interrogatories at them (R513a-516a, 541a-550a). Adding together the interrogatories in Court Exhibits 6, 7 and 10, at least 56 interrogatories were submitted to the jury. Are not the number of these interrogatories, as well as the submission of different forms, enough to confuse a jury? After receiving Court Exhibit 6 in favor of the petitioner (R544a-546a), the Court then decided to send in Court Exhibit 7.

Before sending in Court Exhibit 7, counsel for respondent stated, at page R517a: "I am not quite certain why your Honor is doing it. They are evidently having difficulty completing the present assignment. Is it your notion that giving them more to do is going to help them?"

In view of the fact that petitioner's counsel had requested an adjournment of the trial from Friday to Monday in order that petitioner himself could testify, and in view of the fact that the

District Court had refused such an adjournment unless the attorney for petitioner would consent to waive a jury trial and have the trial proceed by the Court (R384a-396a), the following quotation from the opinion of this Court, in *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35 (1944) is appropriate:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. (Washington & Georgetown R. Co. v. McDade, 135 U.S. 554, 571, 572; Tiller v. Atlantic Coast Line R. Co., supra, 68; Bailey v. Central Vermont Ry., 319 U.S. 350, 353, 354.) That conclusion, whether it relates to negligence, causation, or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

Because the Court did not approve the answers of the jury, it is not a good reason for condemning a seriously injured

petitioner to walk the streets penniless. He should be given a new trial.

## II.

**The lower courts have ignored decisions of this Court by not granting a new trial to petitioner.**

In *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108, 113, this Court decided that the lower courts cannot invade the fact-finding functions of the jury. The following interrogatories and answers appear in the *Gallick* case at pages 110 and 111 of 372 U.S.:

> "13. Did the defendant B & O provide the plaintiff Mr. Gallick a reasonably safe place to work under the facts and circumstances existing at the time? Jury can't decide on this question."

After finding that the injury to the petitioner was proximately caused by the acts or omissions of the respondent, the jury continued its answers:

> "20. (W)as there any reason for the defendant B & O to anticipate that such (maintaining stagnant, infested pool), would or might probably result in a mishap or an injury? No."

The jury answered interrogatory 21 with a "Yes", then resumed with No. 22:

> "22. If the answer to Question 21 is yes, was it within the realm of reasonable probability or foreseeability of the defendant B & O to

> appreciate this proximate causal relationship between the stagnant water, the dead rats, the dead pigeons, the insect bite and the present physical condition of the plaintiff? No."

The Court of Appeals of Ohio reversed the judgment for the petitioner, stating that the causal, chain was based upon a "series of guesses and speculations." At page 113 of the Gallick opinion, the Supreme Court found that the Court of Appeals "improperly invaded the function and province of the jury in this Federal Employers' Liability Act case." The Jones Act (46 U.S.C.A. §688) — the statute involved in the case at bar — is based on the Federal Employers' Liability Act (45 U.S.C. §51).

In the case at bar, the log of the vessel indicated that the weather conditions that the petitioner described existed between the 16th and 26th of August, 1977. Considering that the petitioner testified through an interpreter about 840 days after he was injured, this was the best answer that any reasonable person could give. We cannot expect computer-like accuracy from such a petitioner. In viewing all the circumstances of the case, he testified truthfully and fairly (R501a). In turning out a 23 year old seriously injured petitioner without any compensation, in a case of definite liability, the District Court preferred form to substantial evidence. At least, petitioner should be given a new trial.

At page 116 of the Gallick opinion, the Supreme Court quoted with approval the case of *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 506-507 which held:

> "... under this statute (Federal Employers' Liability Act) the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any

> part . . . in producing the injury. . . " *Material in parentheses supplied.*

The Court of Appeals of the Second Circuit followed both the *Gallick* and *Rogers* cases in *Eggert v. Norfolk & Western Railway Co., et al.*, 538 F. 2d 509, 511 (2 Cir. 1976).

The Gallick Court held that the answers of the jury to interrogatories 20 and 22 (page 17 of this brief) did not create "the conclusion of fatal inconsistency" (372 U.S. 120). Rather, the Gallick Court held as follows on the answers of the jury to the interrogatories:

> ". . . But it is the duty of the courts to attempt to harmonize the answers, if it is possible under a fair reading of them: 'Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way.' Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 364." (372 U.S. 108, 119).

In the case at bar, the jury adopted the petitioner's testimony about the date that he was injured (R501a). It wanted to give a verdict to the petitioner based on liability and injuries. The answers were unanimous and were more harmonious than the answers in the *Gallick* case where the Supreme Court held that the Ohio Court of Appeals "erred in depriving petitioner (plaintiff) of the judgment entered upon a special verdict of the jury."

When one realizes that the District Court would have adjourned this case over the weekend so that the petitioner could testify personally, only if the petitioner had waived a jury (R384a-395a), even-handed justice requires that petitioner be

given a new trial. The petitioner should have been permitted to introduce wage records (R365a-367a; Exhibits 8a, 8b and 8c for identification). These facts show a determination that the Court intended to substitute its opinion in place of the findings of the jury — as forbidden in the *Gallick* case, 372 U.S. 108, 114 and 115. At the minimum, petitioner should be given a new trial and not the freedom to roam the streets penniless.

Further, in the *Gallick* case, 372 U.S. 108, the Court stated that a trial court should reconcile the jury's verdict if at all possible. The Second Circuit stated in *Henry v. A/S Ocean*, 512 F. 2d 401, 406 (2 Cir. 1975) that this general rule "is entitled to broad application". This statement is on contrast to the memorandum order of the District Court in this case (R562a):

> ". . . Whether or not there was a way for the court to uphold the verdict, plaintiff cannot complain of a course that allowed the jury to make its determination finally and unambiguously known. . . ."

We must remember at all times that the verdicts in favor of the petitioner were unanimous.

It is respectfully suggested that this Court should exercise its supervisory power over the lower courts and establish guidelines for adherence by trial courts in submitting interrogatories to a jury under Rule 49(a) of the Federal Rules of Civil Procedure. In the case at bar, the Second Circuit did not follow the command of the *Gallick* case, *supra*, about reconciling a jury's verdict. As stated above, the Second Circuit had held that the general rule of the *Gallick* case, on reconciling a jury's verdict, "is entitled to broad application" — *Henry v. A/S Ocean*, 512 F. 2d 401, 406 (2 Cir. 1975).

The decisions in the District Court and in the Court of Appeals conflict with the determinations of the *Gallick* case, *supra*, on the force of the jury's answers to interrogatories. The petitioner should be given a new trial because of the erroneous actions of these two courts.

## CONCLUSION

**This petition of certiorari should be granted and petitioner be given a new trial for the following reasons:**

1. The lower courts have decided a federal question on interrogatories to a jury in conflict with the decisions of this Court and with the Court of Appeals of the Second Circuit;

2. The petitioner has been deprived of his right to a jury trial under the Seventh Amendment of the Constitution of the United States; and

3. Because interrogatories to juries are a common feature of trials in the District Courts, this Court should exercise its supervisory powers over the lower courts by sending out guidelines on the submission of proper interrogatories by the District Court to a jury.

**Respectfully submitted,**

THOMAS M. BREEN
*Attorney for Petitioner*

## APPENDIX A — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED SEPTEMBER 22, 1980

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

78 Civ. 543(PNL)

JULIO CESAR ALVARADO,

Plaintiff,

-against-

INWOOD PANAMA, S.A.,

Defendant.

PIERRE N. LEVAL, U.S.D.J.

Plaintiff moves for the entry of judgment in accord with the first special verdict returned by the jury, which awarded plaintiff a total of $65,000.00 in damages. Defendant moves for the entry of judgment in accord with the second and third verdicts returned by the jury, with judgment notwithstanding the verdict as to part of the damages assessed. Defendant's motion is granted in large part.

Plaintiff contended that the defendant was liable to him for two injuries he received while employed aboard defendant's vessel, on theories of unseaworthiness and negligence. He also contended that defendant was liable for further damages for its failure to pay maintenance.

*Appendix A*

The jury was required to return a special verdict, answering a series of questions as to each of plaintiff's claims. In the first verdict returned the jury unambiguously rejected plaintiff's claims concerning defendant's liability for his first injury. However, as to the second injury alleged, the jury's finding was ambiguous. Plaintiff's testimony (by deposition since he was unavailable at the time of trial) suggested that the injury had occurred on the 14th of August. However, during the course of trial plaintiff agreed and stipulated that if the injury had occurred on the 14th, defendant could not be liable on either a negligence or unseaworthiness theory. This stipulation resulted from the fact that plaintiff's contention on either theory rested on his allegation that he had been directed to do outside work under extremely unfavorable weather conditions, while the undisputed proof at trial established that the weather encountered by defendant's ship on August 14th was excellent. Accordingly the jury was asked first whether the injury claimed by plaintiff occurred on August 14th and directed that if they answered this question in the negative, they were to determine the date of the injury.

The question whether the injury had occurred on the 14th, was followed by the words "yes" and "no" with spaces for the jury to check the appropriate response. The jury first answered by writing in the space next to "yes", "on or about 8/14/77". They did not respond to the question which asked for the date of the injury if it did not occur on the 14th. It went on to answer that plaintiff's injury was caused by defendant's negligence (although not by unseaworthiness) and found damages in the amount of $50,000.

As to the questions directed to plaintiff's claim for maintenance, the jury answered that he had been entitled to

maintenance until 180 days after an operation he had undergone in the October following his accident, and that plaintiff was damaged by defendant's failure to pay maintenance in the amount of $15,000.

Rather than attempt to resolve the ambiguity in the jury's verdict on my own, I resubmitted the questions to the jury, instructing the jurors to try to be more precise as to the questions of date, directing their attention to the ambiguity in their answers.

Soon after the jury had retired to reconsider its verdict, it sent a note asking if it was free to change other parts of its verdict in light of its new answer to the critical questions. They were directed that they could do so.

The second verdict returned by the jury found that the second claimed injury occurred on the 14th of August and defendant was not liable in negligence or unseaworthiness. It found again that defendant had been liable to pay maintenance until 180 days after plaintiff's operation. However it increased the amount of damages it found to have resulted from this failure to pay maintenance to $20,000, finding $1,400 in past pain and suffering, $10,800 in past lost earnings, $2,800 in past medical expenses and $5,000 in future medical expenses.

Plaintiff objected at trial and now insists that the resubmission was improper. I find, however, that it was fully consistent with insuring plaintiff his right to a jury trial. Plaintiff maintains that it was the Court's duty to resolve all ambiguities in order to uphold the jury's verdict. Whether or not there was a way for the court to uphold the verdict, plaintiff cannot complain of a course that allowed the jury to make its determination finally and unambiguously known. *See Morrison*

v. *Frito Lay, Inc.*, 546 F.2d 154 (5th Cir. 1977); *United States v. 0.78 Acres of Land*, 81 F.R.D. 618 (E.D. Pa.), *aff'd*, 609 F.2d 504 (1979). Plaintiff argues that in resubmitting the matter the court confused the jury and unfavorably influenced their judgment. I find no basis for any such finding. The jury was simply directed to answer more clearly. Plaintiff's motion is accordingly denied.

Defendant contends that with the exception of maintenance payments and the $1,400 for past pain and suffering, the jury's damage finding is unsupported by sufficient evidence.

There was no evidence on which the jury could have found that the plaintiff incurred or would incur further medical expenses as a result of his failure to receive maintenance. The $2,800 awarded for past medical and $5,000 for future medical expenses are accordingly stricken.

Reading the evidence very liberally in plaintiff's favor, almost to the point of stretching it to his benefit, I do find a basis for sustaining a portion of the jury's award of lost earnings.

In awarding maintenance up to 180 days after his operation, the jury found that this was the duration of his curable disability. Such finding was apparently based on the 180 day period of disability predicted in plaintiff's doctor's report. But that disability was caused by the injury for which he was treated, not by his failure to receive maintenance.

The only evidentiary support for the theory that some period of disability resulted from lack of maintenance payments was the fact that plaintiff was forced to discontinue physical therapy about six weeks after his operation because of lack of

funds. The possibility that continued therapy might have shortened his convalescence to less than the 180 days predicted provides a thin, but in my view barely sufficient, basis for sustaining an award of some period of lost earnings attributable to the non-receipt of maintenance. This evidence at best can support the possibility that the convalescence period might have been shortened by three of its remaining 4-½ months. Since the jury found plaintiff's earnings to be $300 per month, three months additional earnings would amount to $900. The award in that amount will be sustained. The award of $10,800 presupposed 36 months of additional earnings. There was no conceivable support for such a finding.

I conclude that the award of lost earnings can be sustained only to the extent of $900, and that the defendant's motion to set aside the verdict must be granted as to the excess over this figure.

Accordingly judgment shall be entered in plaintiff's favor for maintenance up to 180 days following the operation, for lost earnings in the amount of $900 and for pain and suffering in the amount of $1,400, the defendant to be credited for payments made to plaintiff prior to trial. As to the other amounts awarded by the jury, the defendant's motion for judgment notwithstanding is granted.

Submit judgment.

SO ORDERED:

Dated: New York, New York
September 22, 1980

s/ Pierre N. Leval
U.S.D.J.

## APPENDIX B — JUDGMENT NO. 80,1169 OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK ENTERED ON OCTOBER 6, 1980

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

78 Civil 543 (PNL)

JULIO CESAR ALVARADO,

Plaintiff,

-against-

INWOOD PANAMA, S.A.,

Defendant.

This action having duly come on for trial before the Court and a jury, Honorable Pierre N. Leval, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its special verdict and the respective parties having duly moved for entry of judgment and the Court having duly rendered its Memorandum Order herein dated September 22, 1980,

It is Ordered and Adjudged that plaintiff Julio Cesar Alvarado recover of defendant Inwood Panama, S.A. 180 days maintenance at $8.00 per day amounting to $1,440 and $900 for lost earnings and $1,400 for pain and suffering, totalling in all the sum of $3,740 less $3,747.50 previously paid by defendant to plaintiff, leaving a balance of $7.50 which defendant Inwood Panama, S.A. shall have recovery herein of plaintiff Julio Cesar

Alvarado, and that all other claims herein by plaintiff against defendant be dismissed on the merits and, pursuant to 28 U.S.C. 1332 (b) and F.R. Civ. P. 54(d), that defendant Inwood Panama, S.A. recover of plaintiff Julio Cesar Alvarado its costs of action.

Dated: New York, New York
October 3, 1980

s/ Pierre N. Leval
U.S.D.J.

s/ Raymond F. Burghardt
Clerk

## APPENDIX C — JUDGMENT OF THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT DATED MARCH 20, 1981 AFFIRMING JUDGMENT OF THE DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the day of one thousand nine hundred and eighty-one.

Present:

HONORABLE JON O. NEWMAN
HONORABLE AMALYA L. KEARSE,
Circuit Judges.

HONORABLE CHARLES M. METZNER,*
District Judge.

80-7910

JULIO CESAR ALVARADO,

Plaintiff-Appellant,

v.

INWOOD PANAMA, S.A.,

Defendant-Appellee.

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* Of the United States District Court for the Southern District of New York, sitting by designation.

*Appendix C*

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

The principal issue raised on this appeal is whether Judge Leval erred in resubmitting an interrogatory to a jury considering a Jones Act claim. The interrogatory asked, "Did any such injury [suffered by the plaintiff] occur on August 14, 1977?" The date had crucial significance because, in light of the evidence concerning weather and sea conditions, the appellant had stipulated that if the injury occurred on August 14, the appellee was not liable on the Jones Act claim. The jury initially answered the interrogatory by writing in the space next to the "yes" option the words "on or about 8/14/77." Because of the uncertainty this created as to a crucial fact in the case, Judge Leval resubmitted the interrogatory, requesting the jurors to be as precise as they could. The jury then answered the interrogatory by checking the "yes" option. Based on this answer and the stipulation concerning the significance of the August 14th date, Judge Leval entered judgment for the appellee on the Jones Act claim.

*Appendix C*

The resubmission of the interrogatory was well within the District Judge's broad discretion concerning the use of jury interrogatories. *Skidmore v. Baltimore & Ohio R. Co.*, 167 F.2d 54, 66-67 (2d Cir. 1948). Indeed, the failure to attempt to clarify the jurors' initial response might well have jeopardized the validity of any judgment entered upon the initial response.

Appellant also claims that the District Judge abused his discretion in denying, after the appellee had presented its evidence, a continuance sought to enable the appellant to be present to give rebuttal testimony, after his version of the events had been introduced through a deposition. In light of all the circumstances carefully assessed by the District Judge, including the appellant's tardy efforts to attend the trial from his home in Honduras, the denial of a continuance was well within the Court's discretion.

s/ Jon O. Newman
s/ Amalya L. Kearse
Circuit Judges.

s/ Charles M. Metzner
District Judge.

## APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT DATED MAY 13, 1981 DENYING PETITION OF PLAINTIFF-APPELLANT FOR A REHEARING AND THE SUGGESTION FOR A REHEARING IN BANC

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 13th day of May, one thousand nine hundred and eighty-one.

No. 80-7910

JULIO CESAR ALVARADO,

Plaintiff-Appellant,

vs.

INWOOD PANAMA, S.A.,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, Julio Cesar Alvardo,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

*Appendix D*

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/ A. Daniel Fusaro
Clerk

## APPENDIX E — RULE 49(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE

"Rule 49. Special Verdicts and Interrogatories.

(a) SPECIAL VERDICTS. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict."

## APPENDIX F — THE JONES ACT (46 U.S.C.A. 688)

"§688. Recovery for injury to or death of seaman.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. (Mar. 4, 1915, ch. 153, §20, 38 Stat. 1185; June 5, 1920, ch. 250, §33, 41 Stat. 1007.)"

## APPENDIX G — ADVISORY COMMITTEE'S NOTE ON RULE 50(c)(2), EXTRACT AT 31 FEDERAL RULES DECISIONS 646

"Even if the verdict-winner makes no motion for a new trial, he is entitled upon his appeal from the judgment n.o.v. not only to urge that that judgment should be reversed and judgment entered upon the verdict, but that errors were committed during the trial which at the least entitle him to a new trial."

# Opposition

Office - Supreme Court, U.S.
FILED
NOV 2 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-276

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

JULIO CESAR ALVARADO,

*Petitioner,*

—against—

INWOOD PANAMA, S. A.,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR RESPONDENT

WILLIAM M. KIMBALL
*Counsel for Respondent*
100 Park Avenue
New York, N.Y. 10017
(212) 683-2224

## QUESTION PRESENTED

Did the Trial Judge improperly request the jury to clarify its response to special verdict questions?

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## AUTHORITIES

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## STATEMENT

Petitioner seaman sued respondent shipowner* to recover damages and additional maintenance for shipboard injuries in July 1977 at Lake Charles and August 1977 at sea.

The jury returned a special verdict for respondent on the damages claim for the first injury [p. 541 of the Joint Appendix below, hereafter "J.A."] and petitioner did not appeal the judgment entered on that verdict.

Because petitioner stipulated there would be no damages liability for the second injury if it occurred on August 14, 1977 [J.A. 172-173, 354-355], District Judge Leval exercised his F.R. Civ. P. 49(a) authority by requiring the jury to categorically answer the questions:

"2. Did any such injury occur on August 14, 1977?

YES ____

NO ____

3. If answer to question 2 is 'No', on what date did any such injury occur?

_____ "

The jury initially checked the YES answer to question 2 and, consistently, did not answer question 3. However, it wrote alongside the YES answer: "on or about 8/14/77" [J.A. 542]. After remarking to counsel that the extraneous "on or about" "subverts the reason for the form, the reason for the question" [J.A. 510], Judge Leval resubmitted the same special verdict form and asked the jury to answer questions 2 and 3 "as precisely as you can to the best of your ability" [J.A. 516].

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* Respondent is not a publicly held corporation and there is no corporation which has any relationship to respondent as parent, subsidiary, or affiliate which is a publicly held corporation.

With their adventitious "on or about" the jury indicated that petitioner sustained $50,000 damages because of the second injury and $15,000 damages because respondent had not paid more maintenance [J.A. 543]. After Judge Leval requested that resubmitted questions 2 and 3 concerning the second injury date be answered as precisely as possible, the jurors inquired whether they could amend their answers to the damages questions if they definitely answered question 2, which the Judge instructed they could do [J.A. 525].

When later returning a special verdict that the second injury occurred on August 14, 1977 and, in accordance with petitioner's stipulation, that there was no damages liability for that injury [J.A. 549-550], the jury awarded petitioner 180 days additional maintenance and increased to $20,000 his damages for not having been paid more maintenance [J.A. 550], itemized as follows [J.A. 548]:

| | |
|---|---|
| past pain and suffering | $ 1,400 |
| past lost earnings @ $300 per month | 10,800 |
| past medical expenses | 2,800 |
| future medical expenses | 5,000 |
| | $20,000 |

On respondent's motion for judgment notwithstanding the verdict, Judge Leval reduced the $20,000 to $2,300 because of absolute failure of proof [pp. 4a and 5a of Appendices to the Petition, hereafter "a"], and petitioner did not contest that reduction on appeal by indicating any evidence which might even arguably support a larger amount.

Judgment was entered in favor of petitioner for 180 days maintenance at the stipulated daily rate of $8 [J.A. 315-316] and $2,300 damages for failure to pay more maintenance, less $3,747.50 which, unbeknownst to the jury, respondent had concededly advanced [J.A. 315-316], leaving a $7.50 balance in respondent's favor [6a].

## SUMMARY OF ARGUMENT

Even if the jury's initial response had ambiguously favored petitioner, the better practice was to ask the jury for clarification.

## ARGUMENT

Petitioner urges that any ambiguity in the jury's initial response should have been construed in his favor. However, since the jury checked the YES answer to question 2 and did not answer question 3, the extraneous "on or about 8/14/77" tended to favor respondent, as petitioner seems to have admitted by seeking a new trial rather than judgment in his favor.

Even if the ambiguity might seem auspicious for petitioner, Judge Leval was not constrained to resort to exegesis. "With the jury at hand, the mystery of what truth they intended to speak by their verdict could be solved with relative ease" by "the better practice" of requesting "further deliberation to clarify their verdict", *Fugitt* v. *Jones*, 549 F.2d 1001, 1005 (5 Cir. 1977).

Petitioner's effort to make it appear that he was unjustly denied a trial continuance so he could testify "in rebuttal" is quite perverse. Since respondent did not introduce any additional evidence on second injury liability, there was nothing to rebut. As Judge Leval apprehended [S.M. 396], what petitioner unorthodoxly requested was more time to put in his case after respondent had rested, to respondent's obvious prejudice.

## CONCLUSION

The petition should be denied.

Respectfully submitted,

WILLIAM M. KIMBALL
*Counsel for Respondent*

New York, N.Y.
October 29, 1981